

**APPENDIX I**  
**IN THE UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

**NO. 81-3773**  
**Summary Calendar**

**Dr. HEWITTE A. THIAN,**  
**Plaintiff-Appellant,**

**versus**

**SUSAN WILKINSON RAY, ET AL.,**  
**Defendants,**  
**YANCEY WHITE**  
**Defendant-Appellee.**

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**Appeal from the United States District Court**  
**for the Eastern District of Louisiana**

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**(JULY 19, 1982)**

**Before RUBIN, JOHNSON and GARWOOD, Circuit Judges.**  
**RUBIN, Circuit Judge:**

Having won a verdict in a malpractice suit, the surgeon-defendant initiated this reprisal, suing the lawyer who, on behalf of a former patient, had sued the doctor. The diversity-based complaint alleged that the lawyer had conspired with the doctor's former patient and with two physicians (who had expressed opinions that the surgeon was guilty of malpractice) to libel and slander the surgeon and

was grossly negligent in filing and prosecuting the suit against the doctor.

On motion for summary judgment, the district judge, following Louisiana law, as he was bound to do, held that there was no evidence to demonstrate malice on the part of the lawyer, and that, as to this material fact, there was no genuine dispute. Accordingly, the district judge dismissed the case. In doing so, he relied on *Spencer v. Burglass*, 337 So.2d 596 (La. Ct. App. 1976), *writ denied*, 340 So.2d 990 (La. 1977). That case is, indeed, controlling, because it defines the essential elements of a cause of action for wrongful or malicious prosecution of a civil case against a lawyer, as distinguished from the elements of a cause of action against his client, set forth in *Robinson v. Goudchaux's* 307 So.2d 287 (La. 1975).

In *Spencer*, the Louisiana court emphasized that the attorney is simply the instrument through whom a judicial determination is sought. "In the absence of some allegation which would support specific malice by this attorney motivating him to persuade his client to initiate and continue his malpractice case against the doctor, no cause of action is stated against defendant as an attorney for malicious prosecution." 337 So.2d at 600. Malice could not be inferred merely because the attorney, without interviewing witnesses, filed a medical malpractice action or prosecuted the action to judgment or failed to withdraw from the case in the face of uniformly unfavorable medical opinion evidence. The Louisiana court, therefore, affirmed a summary judgment.

The affidavits filed in the district court set forth that the lawyer initially relied upon his client's story and the medical opinion of a doctor who had expressed the opinion that the surgery was the result of misdiagnosis. Later he took the

deposition of another recognized authority who expressed the opinion that there had been malpractice.<sup>1/</sup> There was no evidence that the lawyer had any information to the contrary. While the record does contain 17 identical affidavits by 17 doctors, stating that each finds no evidence of malpractice in the hospital record and that the lawsuit was "frivolous, incompetent and irresponsible," these merely show that there was little merit to the suit, and they do not raise any issue concerning the lawyer's malice or lack of good faith. There is an affidavit by Dr. Thian dealing with the events involved in the surgery, withdrawal by a prior attorney, failure of the lawyer in this case to attempt to secure a copy of the hospital charts, and, in general, the lack of basis for the lawsuit. This, too, may show the lack of merit in the suit but it does not suffice to raise an evidentiary basis to infer malice on the part of the lawyer.

Rule 56 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 56, does not permit a plaintiff to go to trial merely on the allegations of his complaint. When a motion for summary judgment is brought and supported by affidavits or deposition, the plaintiff must come forward with evidentiary material sufficient to raise a genuine dispute of material fact. *Walter E. Heller and Co. v. O/S SONNY V.*, 595 F.2d 968, 975 (5th Cir. 1979). That the surgeon's lawyers told the defendant lawyer that he had no case and that many doctors believed the case to be without merit does not in Louisiana suffice for recovery. Without some evidence of the lawyer's malice, the case is doomed.

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<sup>1/</sup> Indeed, although the doctor did ultimately prevail in the malpractice suit brought against him, his motion for a directed verdict there was denied.

No issue is made on appeal concerning dismissal of the charge of conspiracy to libel. We, therefore, need not discuss it.

Accordingly, the judgment is **AFFIRMED**.

**APPENDIX II**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**NO. 81-3773**

**DR. HEWITTE A. THIAN,**  
**Plaintiff-Appellant,**

**versus**

**SUSAN WILKINSON RAY, ET AL.,**  
**Defendants,**

**YANCEY WHITE,**  
**Defendant-Appellee.**

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**Appeal from the United States District Court for the  
Eastern District of Louisiana**

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**ON PETITION FOR REHEARING**

**(AUGUST 31, 1982)**

**Before RUBIN, JOHNSON and GARWOOD, Circuit Judges.  
PER CURIAM:**

**IT IS ORDERED** that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

**ENTERED FOR THE COURT:**

**/s/ A. B. Rubin**  
**United States Circuit Judge**

**APPENDIX III**

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**NO. 81-3773**

**Summary Calendar  
D. C. Docket No. CA-79-1477-"K"**

**DR. HEWITTE A. THIAN,  
Plaintiff-Appellant,**

**versus**

**SUSAN WILKINSON RAY, ET AL.,  
Defendant,**

**YANCEY WHITE,  
Defendant-Appellee.**

**Appeal from the United States District Court for the  
Eastern District of Louisiana**

**Before RUBIN, JOHNSON and GARWOOD, Circuit Judges.**

**JUDGMENT**

**This cause came on to be heard on the record on appeal  
and was taken under submission by the Court upon the  
record and briefs on file, pursuant to Rule 18;**

**ON CONSIDERATION WHEREOF, It is now here ordered  
and adjudged by this Court that the judgment of the said**

District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

JULY 19, 1982

Issued as Mandate: September 10, 1982

OP-JDT-9  
Rev. 6/82

## APPENDIX IV

### DR. SADLERS DEPOSITION, PAGES 11, 12 and 13

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procedure and, other than a mild postoperative infection, did well and was discharged. Then in January of 1975, because of left-sided abdominal and back pain, she was seen at Spohn Hospital in Corpus Christi, Texas. An adrenal stone was noted, a calculus or a stone. A kidney stone was found. Retrospectively, the history was taken that she had had the bypass operation, and since kidney stones are a common complication of the bypass, the presence of the stone was not surprising. During routine hospital testing, or because of a history of headaches, the patient had a skull x-ray taken. On that skull x-ray, an enlarged sella was seen. This is the area of the skull in which the pituitary sits. The pituitary is an endocrine gland, the so-called master gland in the body. Because of the enlargement of the sella, an endocrinology consultation was obtained. Further work-up revealed that she did indeed have a pituitary tumor as evidenced by a pneumoencephalogram, a special type of x-ray which revealed the presence of a tumor in the sella, and no significant further endocrinologic evaluation was performed at that time. The records that I have do not show any evidence of an evaluation for the presence of a tumor producing a hormone which would lead to Cushing's syndrome.

Q. So there was no evidence of this particular type of manifestation of the disease?

A. That is right. Though she had a pituitary tumor which - - though she had the pituitary tumor diagnosed preoperatively - - it was probably preoperatively - - we could



have predicted that it would have been the most common type of pituitary tumor and not the one that produces Cushing's.

Q. What type of pituitary tumor did she have?

A. A chromophobe adenoma. It just describes the type of cell within it. That is by far the most common type of pituitary tumor. These are benign tumors that occasionally produce a hormone called prolactin. Now, prolactin is the hormone secreted during postpartum, after pregnancy, that causes milk production, so that the clinical characteristics of a person with a chromophobe adenoma or the tumor that produces prolactin are headache, amenorrhea - -

Q. What is that?

A. Loss of menstrual periods. - - and perhaps some visual disturbances.

Important to note is that she did have a visual complaint in January of '75 when seen at Spohn Hospital, but that was historically an acute complaint. Now - -

Q. When you say "historically an acute complaint," what do you mean?

A. It has shown up in the records that she had had a symptom of visual changes for two weeks after admission.

Now, she underwent a surgical procedure, a craniotomy, through which they removed the pituitary tumor. It was shown to be a chromophobe adenoma, as would have been predicted preoperatively. She was then placed on hormonal

replacement therapy for some of the hormones which would now be missing since they either took out or damaged any normal-functioning pituitary. She was put basically on cortisone replacement.

**Q.** What does that do for the body?

**A.** Cortisone is produced by the adrenal under the stimulus of the pituitary, and it really has - - maintains - - is involved in sugar metabolism as well as, again, like thyroid hormone, the maintenance of function of many cells.

**Q.** I want you to tell the jury, please, what the pituitary gland does with respect to the body functions in a general sense.

**A.** What the pituitary gland does is synthesizes or manufactures several hormones which direct the function of other endocrine glands. It makes a hormone called ACTH, which is the hormone involved in stimulating adrenal gland function. It makes TTH which directs the thyroid gland to function. It makes gonadotrophins which are hormones that stimulate the gonads to function, sexual motivation, if you will. The actual functions are of the reproductive system. It makes prolactin, as I mentioned earlier, the hormone involved in lactation.

**Q.** It seems that this pituitary gland, then, activates many other important body functions?

**A.** Right. Now, that is what the normal pituitary gland does. In the presence of a pituitary tumor, as you recall, I referred to the evaluation of possible secondary causes of obesity, one of which is, to reiterate, was hypothyroidism. The second was Cushing's syndrome, neither of which seem

to play a role in this particular patient. The third, though, a very unusual and unlikely secondary cause of obesity is what I refer to as hypothalamic obesity.

In order to understand eating behavior and the abnormalities involved and disorders of eating, we must realize that the hypothalamus, a portion of the brain, actually has a center we . . .

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